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UNITED STATES
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DAVID LESLIE

Real Party In Interest

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION BY REAL PARTY IN INTEREST

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QUESTIONS PRESENTED

1. Does the history of California's actual practice with respect to deciding the merits of federal constitutional issues presented in state petitions for habeas corpus demonstrate that California has a "firmly established and regularly followed state practice" with respect to procedural defaults arising in state habeas corpus proceedings presenting such issues?

2. Did the Court of Appeals abuse its discretion in refusing to conduct interlocutory mandamus review of the district court's order finding California has no "firmly established and regularly followed state practice" with respect to procedural defaults arising in state habeas corpus proceedings when that order is fully reviewable on appeal from final judgment?

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Real Party In Interest, David Leslie Murtishaw, respectfully requests that this Court deny the Petition For Writ Of Certiorari seeking review of the United States Court of Appeals for the Ninth Circuit's judgment and opinion in the above-proceeding entered on May 20, 1993.

STATEMENT OF FACTS

On October 29, 1992, Petitioner Daniel Vasquez (hereinafter "Petitioner Vasquez") filed a motion seeking dismissal of Ground Nos. 2, 5, 9, 10A, 10B, 19, and 20 set forth in the First Amended Petition For Habeas Corpus filed in the United States District Court For the Eastern District of California by Real Party In Interest David L. Murtishaw (hereinafter "Real Party"). On February 16, 1993, the District Court, per the Hon. Oliver W. Wanger, denied the motion in its entirety.[1] [2]

Real Party was tried and convicted of murder with special circumstances, and following a penalty trial a judgment of death was entered on February 2, 1979, by the Superior Court of the State of California, in and for the County of Kern. On automatic appeal to the California Supreme Court his conviction of guilt and the finding of special circumstance were affirmed, but the sentence of death was reversed. *People v. Murtishaw*, 29 Cal.3d 733, 175 Cal.Rptr. 738 (1981), ("*Murtishaw I*"). A new trial was held on the issue of penalty only which commenced on December 1, 1982, and which ended in a sentence of death being imposed on March 18, 1983.

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[1] The motion with respect to Claim 10A was withdrawn by Petitioner at the hearing on the motion.

[2] A chart showing the procedural history with respect to each claim which was the subject of the motion is attached to this Brief in Opposition as Appendix "A."

The judgment of death following Real Party's penalty phase retrial went on automatic appeal to the California Supreme Court, which did not issue a decision affirming the judgment of death until June 8, 1989, over six years after the entry of the judgment following the second trial. The California Supreme Court's decision is reported in *People v. Murtishaw*, 48 Cal.3d 1001, 258 Cal.Rptr. 821 (1989), ("*Murtishaw II*"). A petition for rehearing was timely filed and was denied by the California Supreme Court on August 31, 1989. A Petition For Certiorari to the United States Supreme Court was filed on November 15, 1989, and denied on June 25, 1990.

The California Supreme Court appoints counsel to represent defendants on their automatic appeals from sentences of death. The California Supreme Court also appoints counsel to represent capital defendants for purposes of pursuing habeas corpus petitions and other forms of collateral relief against their death judgments. On March 24, 1984, the California Supreme Court appointed Real Party's current counsel, David H. Schwartz, to represent Real Party on his automatic appeal. The appointment was limited to preparing and presenting an automatic appeal to the California Supreme Court from the judgment entered in the trial court, based upon the record from the trial proceedings. The appointment did not encompass investigation of facts outside the trial record or preparation or filing of a petition for habeas corpus alleging such facts.

In July of 1988, after the California Supreme Court had heard oral argument on Real Party's automatic direct appeal, the California Supreme Court, through an intermediary, solicited Real Party's counsel to undertake representation of Real Party for purposes of investigating potential grounds for a state habeas corpus petition and for filing such a petition

if grounds appeared. Counsel for Real Party formally accepted such an enlarged scope of responsibility under his appointment on August 10, 1988.

At the time of this appointment, California cases had indicated that there should not be "substantial delay" from the time of learning of the factual basis for a habeas corpus petition and the filing of such a petition, but the term "substantial delay" had not been defined.[3] The California Supreme Court had also stated its approval of the practice of having criminal defendants who sought to raise on direct appeal a claim of ineffective assistance of counsel contemporaneously file a petition for habeas corpus where they wished the appellate court to consider facts outside the trial record in connection with the ineffective assistance claim. There was no statement of any specific adverse consequences were a habeas corpus petition raising ineffective assistance of counsel filed after the determination of the direct appeal.[4]

On June 6, 1989, two days prior to the California Supreme Court's issuance of its decision in *Murtishaw II*, the California Supreme Court adopted its "Policies Regarding Cases Arising From Judgments Of Death." These "Policies" included "Timeliness Standards" for filing state habeas corpus petitions. One provision of the "Timeliness Standards" stated that a petition for habeas corpus filed within 90 days after the final due date for an appellant's reply brief on direct appeal would be "presumed to be filed without substantial delay." (Standard 1-1.1) The standards further stated that "any petition that fails

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[3] *In re Stankewitz*, 40 Cal.3d 391, 396-397, fn. 1, (1985).

[4] *People v. Frierson*, 25 Cal.3d 142, 158 (1979); *People v. Pope*, 23 Cal.3d 412, 426, fn. 17, (1979).

to comply with these requirements **may** be denied as untimely." (Standard 1-3, (emphasis supplied)). As of the date the standards were published, June 6, 1989, Real Party's state habeas corpus petition was fifteen months past the presumption date of the newly promulgated "timeliness standards."

The Policies also set forth for the first time guidelines under which counsel appointed by the California Supreme Court to represent death row inmates on habeas corpus petitions could seek funds from the California Supreme Court for investigating possible issues that could be raised on habeas corpus. Petitioner timely requested funding for investigation pursuant to the guidelines, but his initial request was rejected. A subsequent request was granted on September 21, 1990.

On October 2, 1990, Real Party filed his first petition for habeas corpus with the California Supreme Court. That petition raised the claims which were later asserted in the First Amended petition as Ground No. 2, (alleging ineffective assistance of counsel at the guilt and special circumstances phase of Real Party's trial), Ground 5 (alleging that the guilt jury had to unanimously agree on theories of first degree murder), Ground 9 (alleging that the trial court improperly denied funds for psychiatric assistance), and Ground No. 10A, (alleging ineffective assistance of counsel at Real Party's second penalty trial). The State filed an "Informal" response to the petition in which the State argued that the petition should be denied on its merits. The State made no argument that any claim had been procedurally defaulted.

The first state petition was denied on June 21, 1991, with two of the seven justices dissenting. With respect to the claims that are here denominated as Ground Nos. 2 and 10A,

the petition was unequivocally denied on its merits:

> Petition for writ of habeas corpus DENIED in its entirety on grounds that it fails to allege ineffective assistance or new evidence that undermines confidence in the outcome.

(See Appendix A to the Petition for Certiorari).

The claims that are denominated in the First Amended Petition as Ground Nos. 5 and 9 were denied specifically on "the independent additional ground that they were waived by failure to raise them on direct appeal." (Appendix A to the Petition for Certiorari).

The California Supreme Court also stated an alternative basis for denying the writ which applied generally to all claims arising out of the guilt and special circumstance trial, but not the penalty retrial,[5] (which are First Amended Petition Ground Nos. 2, 5, and 9, but not Ground No. 10A):

> All claims related to the guilt and special circumstance judgments are denied on the independent additional ground that the petition fails to justify the delay in raising them. (In re Ronald E. (1977) 19 Cal.3d 315, 321-322; People v. Jackson (1973) 10 Cal.3d 265, 268.)

(Appendix A to the Petition for Certiorari).

On October 2, 1991, Real Party filed his original petition for habeas corpus with the United States District Court for the Eastern District of California. That petition contained each of the claims raised in the first state court petition, with the same designations as in the current First Amended Petition. Two additional grounds which had not been previously

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[5] The guilt and special circumstance trial had concluded in February of 1979, 11.5 years prior to the filing of the petition for habeas corpus. The penalty retrial had concluded in March of 1983, approximately 7.5 years prior to the filing of the petition for habeas corpus.

presented to the state court were also alleged: Ground 19 alleging that the use of lethal gas as a method of execution violated the Eighth Amendment to the United States Constitution, and Ground 20, which alleged that the enactment of the California death penalty initiative was void under the federal constitution.

On November 22, 1991, Petitioner Vasquez filed his original motion to dismiss. The motion raised procedural defaults as to Ground Nos. 5, 9, 15, 19 and 20.[6]

On March 26, 1992, the district court issued an order denying Vasquez' motion to dismiss with respect to claims 19 and 20 because those claims were unexhausted. With respect to the challenges to claims 5, 9, and 15, the district court deferred ruling on those challenges until after Real Party had had an opportunity to present the unexhausted claims to the state court and had filed an amended petition alleging such exhaustion:[7]

> In the interest of efficiency, this court postpones ruling on whether Claims 5, 9, and 15 of the petition should be dismissed until Petitioner returns from the state court. After the petitioner has exhausted all of his state court remedies and, if he so chooses, amended his federal petition to describe those exhausted claims, Respondent may renew the motion to dismiss based on procedural default grounds and shall address all claims to which objection on the ground of legal insufficiency is raised.

(Order Re Respondent's Motion To Dismiss, p. 2.; see Appendix "B" to Real Party's Brief

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[6] In his motion, Vasquez did not allege any procedural default with respect to any of the claims for ineffective assistance of counsel at the guilt and special circumstance trial (Ground No. 2). On January 3, 1992, Vasquez filed his "Answer" to the petition. Affirmative defenses of procedural default and/or exhaustion were alleged against five of the 20 claims. No affirmative defense was alleged with respect to Ground No. 2 concerning ineffective assistance of counsel at the guilt and special circumstances phase of the trial.

[7] The district court's order followed the procedure for unexhausted claims embodied in Local Rule 191(h)(5) of the United States District Court for the Eastern District of California.

in Opposition).

Real Party then proceeded to file his second state petition with the California Supreme Court. In the second state petition, Real Party presented to the state court for the first time the claims raised in Grounds 19 and 20[8]. Real Party also presented a second claim relating to ineffective assistance of counsel at Real Party's second penalty trial, i.e., the failure to explore a defense based on fetal alcohol syndrome.[9] This claim is denominated Ground 10B in the First Amended Petition. Real Party also presented to the state court the claim raised in Ground No. 15 from the original federal petition because Petitioner Vasquez had alleged that the claim had been procedurally defaulted since it had been presented to the state court only in the Real Party's petition for rehearing on direct appeal.

On September 2, 1992, the California Supreme Court denied the second state petition. The state court denied what is denominated as Ground No. 15 in the First Amended Petition on the basis that it had already been raised and decided on direct appeal.[10] What are denominated in the First Amended Petition as Ground Nos. 10B, 19, and 20 were expressly denied on their merits. In addition, these three grounds were denied as "untimely." (See Appendix "B" to the Petition for Certiorari.)

On October 14, 1992, Real Party filed his First Amended Petition in the district court. All grounds previously alleged remained the same. One new ground, number 10B

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[8] Grounds 19 and 20 were identified as "Grounds" "1" and "2" respectively in the second state petition.

[9] This claim was denominated Ground 8 in the second state petition.

[10] As a result, Petitioner Vasquez dropped his assertion of a procedural default as to Ground No. 15.

was added.

On October 29, 1992, Petitioner Vasquez renewed his motion to dismiss for procedural default. On this renewed motion, Vasquez for the first time raised an affirmative defense of "procedural default" as to Ground Nos. 2 and 10A.[11]

Real Party filed a response to Petitioner Vasquez's renewed motion to dismiss. In the response, Real Party cited to and analyzed orders issued by the California Supreme Court in more than 36 habeas corpus proceedings involving capital defendants during the years 1987-1992. Real Party argued that whatever the California Supreme Court might say were its rules regarding procedural defaults for state habeas corpus petitions, its actual record of hearing petitions on their merits, denying them for asserted procedural defaults, or both, showed no settled or consistently applied rules.[12]

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[11] Petitioner Vasquez had been ordered by the district court a year earlier to assert all procedural default objections to the original petition in his answer to that petition. Petitioner Vasquez raised no procedural default objection either to Ground No. 2 or to Ground No. 10A (denominated simply as "Ground 10" in the original Petition). Moreover, there was no basis in the record to suggest any state procedural defect with respect to the presentation to the state court of the claims set forth in Ground No. 10A. At the hearing on his renewed motion, Petitioner Vasquez acknowledged the lack of any basis for claiming procedural default as to Ground 10A and withdrew that part of the motion.

[12] The cases cited to the district court included the following (with their docket numbers, where known, and dates of denial): *In re Ainsworth,* S009535 (1989); *In re Mattson,* (1991); *In re Allen,* S003571 (1988); *In re Bonin II,* S016301 (1990); *In re Hernandez,* S013027 (1990); *In re Moore,* S016650 (1990); *In re Robbins,* (1989); *In re Calvin Coleman, Jr.,* S023949 (1992); *In re Keith Williams,* (1989); *In re Hovey,* (1989); *In re Bonin,* S010087 (1989), S011262 (1989), S016344 (1990); *In re Babbitt,* S009386 (1989); *In re Grant,* (1986), S009417 (1989); *In re Marshall,* (1990), S023919 (1992); *In re Miranda,* (1987), S007965 (1989); *In re Silva,* (1988), S009772 (1989); *In re Karis,* (1990), S022710 (1991); *In re Wade,* (1988), (1989), (1990); *In re Frank,* S013949 (1990); *In re Dyer,* S008594 (1989), S022577 (1991), S023364 (1991); *In re Howard,* S013984 (1990); *In re McLain,* S020204 (1991); *In re Thomas Thompson,* S008382 (1989), S019049 (1991); *In re Michael Williams,* S012400 (1990), S024005 (1992); *In re Harris,* S013598 (1990), S026117 (1992).

Petitioner Vasquez filed no reply to Real Party's response, and made no attempt to refute Real Party's contention that the California Supreme Court had not clearly stated or uniformly applied a rule or rules with respect to when it would deem a petition for habeas corpus defaulted as "untimely."

Petitioner Vasquez then sought a rehearing and request for interlocutory appeal, which requests were denied by order of the district court on April 14, 1993. On May 12, 1993, Petitioner filed a petition for writ of mandamus in the United States Court of Appeals for the Ninth Circuit seeking an order directing the district court to grant Petitioner's motion to dismiss for procedural default. On May 10, 1993, the Ninth Circuit issued an order denying Petitioner's petition for writ of mandate. The present Petition for Writ of Certiorari followed.

REASONS FOR DENYING THE PETITION

Petitioner sets forth a false premise for seeking interlocutory review of a district court order when Petitioner asserts that the district court failed to respect the California procedural default rules for state habeas corpus petitions merely because the California courts retain some degree of discretion to excuse procedural defaults.

In fact, in response to Petitioner's motion to dismiss six claims in the habeas corpus petition for procedural default, Real Party In Interest presented to the district court more than 36 examples of California Supreme Court orders disposing of petitions for habeas corpus by death row inmates over the years 1987 to 1992, including dispositions on the merits of the petitions and dispositions based on asserted procedural defaults by the petitioners. These dispositions evidenced no rule and no discernible pattern as to when the California Supreme

Court would reach the merits of the petition and when the petition would be deemed procedurally defaulted. Nor, for those claims that were deemed procedurally defaulted, was there any rule or pattern as to the reasons for finding a procedural default.

The California Supreme Court, in two cases decided July 29, 1993, has confirmed that the district court was correct in finding that California has not, in the past, established any settled and consistently applied rules for procedural defaults concerning federal constitutional claims raised in state habeas corpus petitions. *In re Clark*, __ Cal.4th __, 1993 WL 282669 (Cal.) (1993); *In re Harris*, __ Cal.4th __, 1993 WL 282668 (Cal.) (1993).

The Petitioner has not demonstrated that the district court acted without jurisdiction and, in any event, Petitioner is not entitled to mandamus because Petitioner has an adequate remedy on direct appeal. The district court order denying dismissal of claims pertains to only six of twenty-one claims raised in the federal habeas corpus petition filed by Real Party in Issue. The other 15 claims will necessarily be decided on their merits, and in all probability will require the holding of an evidentiary hearing. The burden to Petitioner of having the district court order reviewed through direct appeal instead of through the issuance of an extraordinary writ is *de minimis*.

ARGUMENT

I. THE PETITION IS BASED ON A FALSE PREMISE: THE ORDER OF THE DISTRICT COURT DENYING PETITIONER'S MOTION TO DISMISS WAS GROUNDED NOT ON A LACK OF RESPECT FOR STATE PROCEDURAL RULES, BUT ON A FINDING THAT CALIFORNIA LACKED ANY SETTLED OR UNIFORMLY APPLIED RULES WITH RESPECT TO TIMELINESS OF A PETITION FOR HABEAS CORPUS FILED WITH THE STATE COURT

Petitioner Vasquez seeks to have this Court grant certiorari based upon a false premise, i.e., that:

> California's procedural default rules are well-defined and regularly followed; the rules should be respected even though the California Supreme Court retains discretion to forgive procedural defaults in certain cases.

Petition for Certiorari, p. 9.

The premise is false because California has had no settled or uniformly applied rule as to when a petition for habeas corpus was timely filed.[13] The district court's opinion denying the motion to dismiss is not predicated upon a finding merely that the California Supreme Court retains some discretion to waive a settled and uniformly applied rule for timely filing. Rather, the decision makes the clear finding that the California Supreme Court has not articulated **any** meaningful rule as to when it would refuse to consider a petition on its merits because it was untimely. It is also predicated upon the record presented by Real Party showing the arbitrary and inconsistent manner in which the California Supreme Court

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[13] Nor has California developed a settled and uniformly applied rule for when a claim of error which could have been raised on direct appeal but was not could be raised for the first time on a petition for habeas corpus.

has deemed some petitions defaulted as untimely while deciding on the merits without mention of default other petitions which were as tardy or more tardy than the defaulted petitions.

It is a fundamental rule that only a "firmly and regularly followed state practice...can prevent implementation of federal constitutional rights." *James v. Kentucky*, 466 U.S. 341, 348-349, (1984). A state procedural rule is not "'adequate' unless the procedural rule is 'strictly or regularly followed.'" *Hathorn v. Lovorn*, 457 U.S. 255, 262-263 (1982) (quoting *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964)). Thus, to constitute an adequate and independent procedural bar a state procedural rule must, among other requirements, be clearly established and consistently applied by the state court invoking it. See, *e.g.*, *Johnson v. Mississippi*, 486 U.S. 578; *Coleman v. Saffle*, 869 F.2d 1377 (10th Cir. 1989), cert. denied, 494 U.S. 1090, 110 S.Ct. 1835 (1990); *Ulster County Court v. Allen*, 442 U.S. 140, 60 L.Ed.2d 777 (1979).

For example,[14] in the district court Petitioner Vasquez asserted that Grounds 10B, 19 and 20 were not subject to federal review because, in addition to denying these claims on their merits, the California Supreme Court had stated the claims were:

> also denied for the independent reason that they are untimely.

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[14] When it issued its denial of Real Party's first state habeas corpus petition, the California Supreme Court said that the issues relating to guilt and special circumstance determinations were denied additionally because the petition "fails to justify the delay in raising them" and cited to *In re Ronald E.*, 19 Cal.3d 315, 321-322 (1977) and *People v Jackson*, 10 Cal.3d 265, 268 (1973). In denying the second petition, the California Supreme Court used the term "untimely" and cited to the Supreme Court Policies and *In re Stankewitz, supra*. Although the two orders are arguably referring to the same procedural problem, the absence of consistent terminology or legal citation is additional evidence that no settled rule existed.

> (See *In Re Stankewitz* (1985) 40 Cal.3d 391, 396-397, fn. 1; Supreme Court Policies Arising from Judgments of Death, eff. June 6, 1989, mod.eff. Sept. 28, 1989, standards 1-1 et seq.

In ruling against Petitioner Vasquez, the district court stated:

> The respondent has failed to demonstrate that the California Supreme Court has applied the timeliness rule set forth in *Stankewitz* in a consistent manner. In contrast, the petitioner has demonstrated that the Court does not consistently apply this rule. Therefore, the procedural ground of failure to file these claims in a timely manner is not adequate.
>
> This conclusion is unaffected by the California Supreme Court's reliance on its policies set forth in Timeliness Standard 1-3, a petition that fails to comply with the timeliness requirements *may* be denied as untimely. The California Supreme Court clearly retains discretion in denying a petition for writ of habeas corpus that is not filed in accordance with the timeliness standards. As a result, the policies are not adequate to support the California Supreme Court's decision.

(Appendix C to the Petition for Certiorari, pp. 10-11.)

Prior to the announcement of the Supreme Court Policies Arising from Judgments of Death, eff. June 6, 1989, the California Supreme Court had, in effect, only deemed habeas corpus petitions "untimely" when it had, in its discretion, considered the use of the petition to be abusive or dilatory. In *In re Stankewitz,* 40 Cal.3d 391, 396-397, fn. 1, the California Supreme Court stated that a habeas corpus petitioner "must justify any substantial delay in seeking relief," but it failed to define the term "substantial delay." Moreover, in the context of Stankewitz's petition, it appeared that "delay" meant delay between learning of the facts which supported the claim in the petition and filing the petition, rather than the absolute amount of time which had elapsed between the judgment being attacked and the filing of the petition. The term "substantial delay" was not further defined prior to the time Real Party filed his petitions with the California Supreme Court.

The Supreme Court Policies Arising from Judgments of Death, eff. June 6, 1989, did not define substantial delay, but only established a "safe haven" for petitions that are filed within 90 days after the due date for the reply brief on the automatic appeal. With respect to petitions filed thereafter, the June, 1989 Policies are not informative. They do not establish any **presumption** of untimeliness, but merely indicate a petition **may** be denied for untimeliness if it does not allege facts justifying a substantial delay. (See *In re Clark*, __ Cal.4th __, 1993 WL 282669 (Cal.) p. 30 (1993). In summary, under the Policies, habeas corpus petitions filed more than 90 days after the due date for the reply brief on direct appeal may be denied as untimely, but then again, they may not.

The district court decision is premised on a finding that the California Supreme Court had not established any settled rule as to when a petition for habeas corpus would be deemed untimely, or as to what standards would be applied to excuse an otherwise "untimely" filing. The district court's finding has now been confirmed by the California Supreme Court itself in *In re Clark*, __ Cal.4th __, 1993 WL 282669 (Cal.) (1993). (See Argument II, *infra.*) The district court order does not disrespect a well settled rule for procedural default in California, rather it recognizes what the California Supreme Court has also recognized, that no well settled and consistently applied rule existed, at least up to July 29, 1993, when the decision in *In re Clark, supra,* was issued:

> Regularity and consistency, however, were not evidence in the past. As the majority all but expressly concede, before today procedural "rules" were discretionary: they were invoked or not with a view toward furthering the interests of justice in the individual case.

In re Clark, supra, Mosk, J. concurring, 1993 WL 282669, p. 34.

In the district court Petitioner Vasquez moved to dismiss Grounds 5 and 9 because the California Supreme Court had stated that in addition to denying them on their merits, they were denied "on the independent additional ground that they were waived by failure to raise them on direct appeal."

The district court rejected the motion to dismiss Grounds 5 and 9 because it found:

> California courts have repeatedly held that the rule that claims not raised on appeal are not cognizable on habeas "'is merely a discretionary policy governing the exercise of the reviewing court's jurisdiction to issue the writ.'" *In re Wallace*, 3 Cal.3d 289, 292, (1970) (quoting *In re Black*, 66 Cal.2d 881, 887 (1967). See also *In re Coughlin*, 16 Cal.3d 52, 55 (1976) and *In re Antazo*, 3 Cal.3d 100, 107 (1970) (the rule that habeas corpus cannot serve as a second appeal is primarily a discretionary policy which may be overlooked where special circumstances are deemed to exist); *In re Duran*, 38 Cal.App.3d 632, 635 (4th Dist. 1974) (habeas corpus is not ordinarily a substitute for appeal but the court has discretion to issue the writ if it believes an appeal is not adequate or if a prompt disposition is required in the interests of justice); 6 B.E.Within & Norman L. Epstein, California Criminal Law § 3340 (2d ed. 1989) ("The requirement of the exhaustion of the appellate or other remedy . . . is merely a discretionary policy governing the exercise of the reviewing court's jurisdiction to issue the writ").

The "discretion" which the district court refers to is not a channeled discretion to apply a defined exception to an otherwise settled and consistently applied rule that issues which could have been raised on direct appeal are procedurally barred if raised for the first time in a habeas corpus petition. Rather, the authorities cited by the district court in its decision demonstrate that the California courts have historically exercised an unfettered discretion to decide claims which could have been raised on direct appeal but were not. In short, the California courts have viewed habeas corpus petitions as a vehicle whereby prisoners could present issues for discretionary review even for claims which could have

been raised on direct appeal but were not.

The issue presented by the petition for certiorari is not whether the district court order has accorded sufficient respect to a well-settled rule of state court procedure. Nor does the petition present the issue whether a default under a state procedural rule which permits the state court some degree of latitude to exercise a defined discretion to excuse default bars federal review under 28 U.S.C. § 2254.

Rather, the only issues presented are whether, as of the time of Real Party's two state petitions, California had established **any** settled and consistently applied rules of procedure with respect either to the timeliness of state petitions for habeas corpus or with respect to the review of the merits of issues which could have been presented on direct appeal. The district court reached the correct conclusion as to these issues. Therefore the granting of certiorari would be inappropriate and improvident.

II. THE CALIFORNIA SUPREME COURT HAS RECENTLY ACKNOWLEDGED THAT IT HAD NOT DEFINED RULES PERTAINING EITHER TO WHEN A PETITION FOR HABEAS CORPUS IS TIMELY OR WHEN IT WILL CONSIDER AN ISSUE RAISED IN A PETITION FOR HABEAS CORPUS EVEN THOUGH THE ISSUE COULD HAVE BEEN RAISED ON DIRECT APPEAL

A. The California Supreme Court Has Acknowledged In *In re Clark* That Its Rules And Exceptions To Those Rules For Timely Filing, Repetitious Filing, And Piecemeal Filing Of Habeas Claims Have Not Been Either Well Settled Or Consistently Applied.

In the recent decision of *In re Clark*, ___Cal. 4th ___, 1993 WL 282669 (Cal.) (filed July 29, 1993), the California Supreme Court dealt directly with the question when an "unjustified delay" in filing a state habeas corpus petition bars consideration of the merits of the petition, and when an exception to such a procedural bar will be allowed. The court

acknowledged that its procedural default rules regarding the filing of habeas corpus petitions have been less than clear and the exceptions to those rules not consistently applied.

In the decision, the California Supreme Court attempted to clarify the procedural rules governing the filing of petitions by state prisoners in the state court. The Supreme Court of California expressly acknowledged in this opinion that the rules regarding procedural defaults had not been clearly stated in the past:

> Before considering the possible merit of any claim, it is therefore appropriate to review the decisional and statutory law governing collateral attacks on judgments of conviction by petition for writ of habeas corpus. In addition, **because no clear guidelines have emerged in our past cases, we consider when departure from those rules is warranted**.

In re Clark, supra, at ___Cal. 4th ___, 1993 WL 282669 p. 4, (emphasis supplied).

The court specifically addressed the question of "piecemeal presentation of claims," noting that the rules had been undefined concerning the presentation of claims on a piecemeal basis:

> Our past decisions have thereby suggested that the rules against piecemeal presentation of claims and repetitious petitions are subject to undefined exceptions and that the court may be willing to entertain multiple collateral attacks on a judgment notwithstanding the potential for abusive writ practice. As a result, many prisoners present petitions raising claims that are or should be barred. They do so either in the hope that this court will find their claims sufficiently compelling as to justify an exception to the rules, or because the possibility that this court will excuse a procedural default makes the petition a necessity in order to exhaust the petitioners' state remedies for purposes of review in federal court.

In re Clark, supra, at ___Cal. 4th ___, 1993, WL 282669, p. 4.

Additionally, the court addressed the issue of "delayed" claims. The decision refers

to long standing rules that a petitioner must "explain and justify" any substantial delay, but still fails to define the term "substantial delay," or to set forth either any clear rule as to when a petition will be denied as "untimely" or any clearly defined exception to such rule.[15]

Nevertheless, the decision does confirm the position of Real Party and the holding of the district court, that the Supreme Court Policies Regarding Cases Arising from Judgments of Death did not establish an affirmative definition of "substantial delay" but merely established a presumption of timeliness for petitions filed within 90 days of the final due date for the reply brief on direct appeal. *In re Clark, supra,* ___Cal. 4th ___, 1993, WL 282669, p. 18.

The opinion further states:

> The Policies did, for the first time, impose an express obligation on counsel representing appellants in capital cases to investigate

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[15] Real Party does not contend that *In re Clark* has, in fact, settled any procedural default rules for habeas corpus petitions filed with the California state courts. Rather, Real Party would submit that Justice Mosk is correct when he writes in his concurrence:

> On reflection, at least one of the majority's purposes becomes manifest. They seek to prevent federal courts from reviewing federal constitutional claims, especially in capital cases. Success in this endeavor turns on the adequacy and independence of any state procedural bar. (See, e.g., *Harris v. Reed* (1989) 489 U.S. 255, 260-262.) For its part, adequacy presupposes the regular and consistent application of the bar. (See e.g., *Dugger v. Adams* (1989) 489 U.S. 401, 410, fn.6.) Regularity and consistency, however, were not evident in the past. As the majority all but expressly concede, before today procedural "rules" were discretionary: they were invoked or not with a view toward furthering the interests of justice in the individual case. Regularity and consistency are not likely to present themselves in the future. The majority's procedural "rules" are indeterminate at their very core. As such, they lend themselves only to arbitrary and capricious operation.

possible bases for habeas corpus. . .

> Because counsel's obligation was created only by the Policies, however, claims that were discovered only as a result of investigation commenced promptly after June 6, 1989, the date on which the Policies became effective, will be deemed timely if presented promptly after counsel became aware of them.

In re Clark, ___Cal. 4th ___, 1993, WL 282669, p. 19.

Since Real Party commenced investigation of habeas claims as soon after June 6, 1989, as the California Supreme Court authorized some funding to pay for such investigation, it would appear that under the holding of *In re Clark, supra,* Real Party's claims on his first state habeas petition should have been deemed timely.[16]

Although the decision in *In re Clark, supra,* purports to establish timeliness standards for state petitions, it offers no insight into why the California Supreme Court on Real Party's first state petition, procedurally defaulted claims relating to the guilt phase of the proceedings for a delay of 11.5 years, but did not find a procedurally default with respect for the claims arising out of the second penalty trial where the delay was 7.5 years.

Both by what it has said, and by what it has not said, the California Supreme Court in *In re Clark, supra,* has demonstrated that there have been no "adequate" habeas corpus procedural default rules for purposes of barring federal review of claims raised on a state

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[16] *In re Clark,* also set forth an express exception to timeliness rules for a claim in a state habeas petition which attacked the validity of a death penalty statute, holding that such claims "may be presented at any time" and "have not been subject to ... the rules requiring justification for delay." *In re Clark, supra,* 1993 WL 282669 at page 5, fn 4. Ground No. 20, asserts that the California initiative which reinstated the death penalty in California is void as being in violation of Article IV, Section 4 of the United States Constitution. The California Supreme Court deemed this claim "untimely" when it was presented, although under the rules enunciated in *In re Clark,* it could not be.

habeas and decided on their merits.

B. In *In re Harris*, The California Supreme Court Acknowledged That California Has Had No Well Settled Or Consistently Applied Rule As To When An Issue Which Had Been Raised On Direct Appeal, Or Which Could Have Been Raised On Direct Appeal, Was Subject To Procedural Default If Raised In A Habeas Corpus Petition.

On July 29, 1993, the California Supreme Court issued its decision in *In re Harris*, __ Cal.4th __ , 1993 WL 282668 (1993). The decision addressed the rules which should govern when a California court should consider issues raised on a petition for habeas corpus where the issue had been previously raised on appeal (the so-called "Waltreous rule")[17] or could have been raised on appeal (the so-called "Dixon rule").[18]

In *In re Harris, supra*, the California court sought to define new rules for determining when issues which were or could have been raised on direct appeal would be heard on their merits in a habeas corpus petition. The court expressed the desire to balance the need of the state for finality against the interest of the individual in vindicating his or her constitutional rights. Referring to the status of the procedural default rules prior to the issuance of *In re Harris*, the court stated:

> In the past, we balanced the two interests by declaring that the opportunity for a third judicial review (trial, appeal, post-appeal habeas corpus) of a claim was appropriate only where the litigant made a colorable showing that a "fundamental"

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[17] *In re Waltreous*, 62 Cal.2d 218, 255 (1965).

[18] Although the specific petition before it raised issues which the petitioner had previously presented to the trial court and to the appellate court on direct appeal, the California Supreme Court stated that "much of the following discussion also applies to the so-called Dixon rule, which generally prohibits raising an issue in a post-appeal habeas corpus petition when that issue was not, but could have been raised on appeal. (*In re Dixon*, (1953) 41 Cal.2d 756, 264 P.2d 513)."

> constitutional right was violated. Thus, we explained that a constitutional issue would not be cognizable on a post-appeal petition for a writ of habeas corpus unless the petition could show "the defect so fatally infected the regularity of the trial and conviction as to violate the fundamental aspects of fairness and result in a miscarriage of justice." (In re Winchester, supra, 53 Cal.2d at p. 532, 2 Cal.Rptr. 296, 348 P.2d 904.)
>
> This formulation permitted criminal defendants to gain a degree of post-conviction, post-appeal review for important constitutional violations that, for one reason or another, had gone unremedied. The inability of criminal defendants to gain vindication of their constitutional claims in the appellate courts, especially those claims affecting the ultimate fairness of their trials, justified an exception to the Waltreus rule for claims of "fundamental" constitutional error. Implicitly, this court found that in balancing the need for such review with the state's need for finality of judgments, the individual's need was the greater one.

In re Harris, supra, ___ Cal.4th ___, 1993 WL 282668, p.7. This "wide-ranging 'fundamental constitutional rights' exception to the Waltreus rule"[19] was in effect when the state court denied Real Party's first petition in its entirety on its merits and then added that [Grounds 5 and 9] "are denied on the independent additional ground that they were waived by failure to raise them on direct appeal." (Appendix A to the Petition for Certiorari).

The California Supreme Court has thus acknowledged that there was a wide ranging, substantively based exception to the Waltreous and Dixon rules. Where the state court perceived that the habeas corpus claim raised fundamental constitutional rights which needed to be vindicated, it would, in its discretion, ignore any procedural barrier and proceed to determine the claim on its merits. The state court exercised its discretion to ignore its own rules on procedural defaults, based on its own view as to the importance of the substantive

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[19] *In re Harris,* _ Cal.4th __, 1993 WL 282668, p. 9.

right affected; it did not utilize any clearly defined basis for excusing or justifying the procedural rule which had been defaulted. Thus, the discretion being exercised was necessarily "unfettered." The exercise of such unfettered discretion is the antithesis of a "rule."

The denial of Ground Nos. 5 and 9 to Real Party's First Amended Petition on the basis of *In re Dixon, supra,* was the exercise of an unfettered discretion. The correctness of the district court finding has been confirmed by the California Supreme Court. The alleged "procedural default" is not adequate to bar federal review under 28 U.S.C. § 2254.

Contrary to Petitioner's assertion, the petition does not present a question whether a state procedural rule may be subject to some limited discretionary application, for the record discloses that no meaningful state procedural rule has ever existed. Real Party respectfully submits that granting the writ on the basis set forth in the Petition would be improvident.

III. REAL PARTY DID NOT PROCEDURALLY DEFAULT ON THE CLAIMS ASSERTED IN GROUND NOS. 2, 10B, 19, AND 20 AS ALL WERE DENIED ON THEIR MERITS BY THE CALIFORNIA SUPREME COURT, AND ANY SEPARATE PROCEDURAL DEFECT IN BRINGING THE COLLATERAL PROCEEDING IS NOT AN ADEQUATE INDEPENDENT STATE GROUND ON WHICH THE UNDERLYING JUDGMENT RESTS

Although the district court decision rested on the absence of settled and consistently applied rules of procedural default in California habeas corpus jurisprudence, the denial of Petitioner Vasquez's motion to dismiss Grounds 2, 10B, 19, and 20 is correct for the additional reason that each of these grounds was presented to the California Supreme Court and decided on its merits. For each ground, the alleged "procedural default" cited by

Petitioner is merely a procedural shortcoming in the manner in which Real Party prosecuted the collateral attack on his judgment; the "default" did not prevent the state court from deciding the issue on its merits; the default did not constitute an adequate and independent ground supporting the judgment of death against Real Party.

The "procedural default" rule established by *Wainwright v. Sykes,* 433 U.S. 72 (1977) was designed to prevent a federal petitioner from seeking relief without affording the state court an opportunity to pass on the merits of the habeas petitioner's claim.

> [W]e deal only with **contentions of federal law which were not resolved on the merits in the state proceeding** due to respondent's failure to raise them there as required by state procedure.

Wainwright v. Sykes, supra, 433 U.S. at 87, (emphasis supplied).

In *Harris v. Reed,* 489 U.S. 255 (1989) the state court denied a state habeas corpus petition indicating that a failure to raise the same issues on direct appeal represented a procedural default. The state court had also denied the habeas claim on its merits. This Court found there was no "procedural default."

State court judgments which **rest** on adequate and independent state law procedural defaults may in general not be disturbed by federal review under 28 U.S.C. § 2258 because:

> When a federal habeas court releases a prisoner held pursuant to a state court judgment that rests on an independent and adequate state ground, it renders ineffective the state rule just as completely as if this Court had reversed the state judgment on direct review. See Fay, supra, at 469, 83 S.Ct., at 864-865. (Harlan, J., dissenting). In such a case, the habeas court ignores the State's legitimate reasons for holding the prisoner.

Coleman v. Thompson, ___ U.S.___ , 111 S.Ct. 2546, 2254 (1991)

In California, the state habeas corpus petition represents a collateral attack on the

state court judgment of conviction. The state prisoner's judgment of imprisonment (or in this case death) does not rest upon any order or judgment in the collateral proceedings. A procedural default in prosecuting a collateral attack on the criminal judgment does not establish an adequate and independent state ground for upholding such judgment since the judgment does not, and cannot rest on such a default. Hence a procedural default, such as a failure to raise a claim in a state habeas corpus proceeding in a timely fashion, will not deprive the federal court of jurisdiction to examine the lawfulness of the imprisonment and conviction.

Coleman distinguished the jurisdictional concept of an adequate and independent state ground supporting the criminal judgment from a procedural default which **prevents** the state court from reaching the merits of the federal question:

> When the independent and adequate state ground supporting a habeas petitioner's custody is a state procedural default, an additional concern comes into play. This Court has long held that a state prisoner's federal habeas petition should be dismissed if the prisoner has not **exhausted** available state remedies as to any of his federal claims.

Coleman v. Thompson, supra, 111 S.Ct. at 2555. When the federal court declines to review a federal claim because the petitioner has failed to exhaust his state remedies by obtaining a state court determination on the merits of the claim, the federal court is declining on the basis of comity, not because it lacks jurisdiction.

Petitioner's custody and sentence of death does not rest upon the denial of either of his state habeas corpus petitions, but upon the affirmance of his judgment of conviction and sentence on direct appeal. A failure to comply with the state's procedure for habeas corpus petitions cannot create an adequate and independent state ground for supporting the judgment

by which Petitioner is confined and sentenced to death.

While it is true that in many instances a failure to comply with the state's procedure for habeas corpus petitions will result in a failure to have the state court pass on the merits of the claim, and thereby leave the petitioner with a failure to exhaust his remedies, (*Coleman v. Thompson, supra,* ___U.S.___, 111 S.Ct. at 2554-2555), in Petitioner's case the California Supreme Court **has** passed on the merits of Ground Nos. 2, 10B, 19, and 20.

Petitioner has exhausted the claims raised in Grounds 2, 10B, 19, and 20, not just technically, but substantively. The state court has not held that any of these claims have been "waived" or are otherwise barred under state law. For these Grounds the record contains no adequate and independent state law basis for upholding the sentence of death.

The district court order which Petitioner seeks to overturn through this petition is valid as to Grounds 2, 10B, 19, and 20 on grounds not addressed in the petition for certiorari. The issue which Petitioner seeks to have this Court address is therefore not sufficient to have a writ of mandate issue with respect to four of the six Grounds for which Petitioner seeks dismissal. It would be improvident to grant the writ as the issue it raises is not dispositive with respect to the granting of the relief which Petitioner seeks.

IV. THE COURT OF APPEALS' DISCRETIONARY REFUSAL TO EXERCISE MANDAMUS JURISDICTION AS TO AN INTERLOCUTORY ORDER SUBJECT TO ORDINARY APPELLATE REVIEW IS UNWORTHY OF CERTIORARI

Petitioner Vasquez, asserting this to be "a case about federalism," see Petition for Writ of Certiorari at 8, quoting *Coleman v. Thompson,* 501 U.S. ___, 111 S.Ct. 2546, 2252 (1991), argues that the Court of Appeals' failure to exercise its discretion to depart from the normal rules governing appellate review by issuing a writ of mandamus to the trial court

threatens to undermine California's alleged "long-established procedural default rules." Petitioner is wrong. This petition for writ of certiorari does not involve an issue of federalism. It involves a simple issue of federal appellate procedure, and it fails to present any "special and important" reasons for exercise of this Court's discretionary jurisdiction. See Sup.Ct. R. 10.

Since the Judiciary Act of 1789 it has been Congress' determination that appellate review should, as a general matter, await entry of the final judgment of the trial court. See *Allied Chemical Corp. v. Daiflon*, 449 U.S. 33, 35 (1980); see also 28 U.S.C. § 1291(a) (granting courts of appeals jurisdiction to review "final decisions" of the district courts). The final judgment rule is not grounded on "mer[e] technical conceptions of 'finality,'" *Catlin v. United States*, 324 U.S. 229, 233, but on the interests of the fair and efficient administration of justice, and on the need to prevent "the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise...." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981) (internal quotation marks and citation omitted).

Although the courts of appeal have jurisdiction to issue writs of mandamus with respect to interlocutory orders, the remedy of mandamus is reserved for extraordinary circumstances. *Allied Chemical Corp. v. Daiflon, Inc., supra*, 449 U.S. at 34; *Will v. United States*, 389 U.S. 90, 95 (1967). A judicial readiness to issue writs of mandamus in anything less than extraordinary situations would run afoul of the very policies sought to be furthered by Congress in enacting the final judgment rule. *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943); *Kerr v. U.S. District Court*, 426 U.S. 394, 403 (1976).

Thus, this Court requires a party seeking the writ to demonstrate that there exist no other adequate means of attaining the desired relief. *Roche v. Evaporated Milk Assn., supra,* 319 U.S. at 26. "The general principle which governs mandamus is, that whatever can be done without the employment of that extraordinary writ, may not be done with it. It lies only when there is practically no other remedy." *Ex parte Rowland,* 104 U.S. 604, 617 (1882). In particular, an applicant must demonstrate that appeal from final judgment is an inadequate remedy. *Helstoski v. Meanor,* 442 U.S. 500 (1979); *Ex parte Fahey,* 332 U.S. 258 (1947). The hardship resulting from delay and a potentially unnecessary trial does not satisfy this requirement. *Bankers Life & Cas. Co. v. Holland,* 342 U.S. 379, 384 (1953); *United States Alkali Export Assn. v. United States,* 325 U.S. 196, 202 (1945); *Roche v. Evaporated Milk Assn., supra,* 319 U.S. at 31.

Even where appeal from final judgment is an inadequate remedy, issuance of the writ remains discretionary. *Kerr v. U.S. District Court, supra,* 426 U.S. at 403; *Schlagenhauf v. Holder,* 379 U.S. 104, 112 n.8 (1964). In order to ensure that the writ is reserved for truly exceptional cases, parties requesting relief must demonstrate that the lower court engaged in a "clear abuse of discretion" or in "conduct amounting to usurpation of judicial power." *Mallard v. U.S. District Court,* 490 U.S. 296, 309 (1989) (internal quotation marks and citation omitted).

The Court of Appeals correctly found that this case does not warrant the drastic remedy of mandamus and that the State failed to make the required showing of exceptional circumstances. In particular, Petitioner Vasquez fails to show that the ordinary avenues of appellate review afford him an inadequate remedy. Petitioner Vasquez complains that unless

the state's rights to assert the defense of state procedural default are vindicated now, he will be forced to undergo the hardship of responding to the merits of Real Party's habeas claims. This is not, however, the type of hardship that is sufficient to justify the use of the extraordinary remedy of mandamus. See, *Bankers Life & Cas. Co. v. Holland, supra,* 342 U.S. at 384; *United States Alkali Export Assn. v. United States, supra,* 325 U.S. at 202.

Moreover, requiring the Petitioner Vasquez to respond to the merits of Real Party's potentially defaulted claims is not unduly burdensome. Real Party's petition for writ of habeas corpus includes 21 claims for relief. Petitioner Vasquez's motion to dismiss for alleged procedural default involves only six of those claims. The additional burden incident to the district court's requirement that the State respond to the substance of 15 claims, rather than 21, hardly mandates appellate court intervention.[20]

Petitioner Vasquez also contends that the necessity of awaiting entry of final judgment may deprive him of any opportunity to obtain appellate review of the trial court's order. Petitioner Vasquez argues that if he prevails on the merits of Real Party's claims that are the subject of the asserted bars, the trial court's refusal to impose those bars will be unreviewable. Petitioner Vasquez is incorrect, and the state is apparently unaware of Petitioner Vasquez's right to pursue a cross-appeal under Federal Rule of Appellate Procedure 4 (a)(3). The right of a prevailing party to file a cross-appeal from the denial of a potentially-dispositive unfavorable pretrial ruling is well-established. See, e.g., *Roth v.*

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[20] That the asserted procedural defenses pertain to only a few of Real Party's claims apparently is the reason the trial court refused to certify its order for immediate appeal under 28 U.S.C. Section 1292 (b) or to grant a stay of proceedings while the State pursues this application for writ of certiorari.

Garcia Marquez, 942 F. 2d 619 (9th Cir. 1991); *Standard Alaska Production Co. v. Schaible,* 874 F. 2d 624, 625 (9th Cir. 1989); *Hilton v. Mumaw,* 522 F. 2d 588, 603 (9th Cir. 1975). A nonfinal order may become cross-appealable upon the entry of a final order. See *Peoria & Pekin Union Ry. v. United States,* 263 U.S. 528, 535-36 (1924). Such nonfinal orders are appealable even where the final order is entirely favorable to the cross-appellant. *Hilton v. Mumaw, supra,* 552 F.2d at 603. The risk that the cross-appellant might become aggrieved upon reversal of the direct appeal is sufficient to confer standing to appeal. *Id.*; 9 Moore, Federal Practice and Procedure ¶ 203.06 (1993) ed.

Thus, even if Petitioner Vasquez does prevail on the merits of the claims to which the alleged procedural bars apply, he will be able to obtain appellate review of the trial court's rejection of asserted defenses. See also, *Engleson v. Burlington Northern,* 972 F.2d 1038, 1041 (9th Cir. 1992) (an appellee may urge on appeal any matter on the record to support the judgment rendered below; *United States v. 101.80 Acres of Land,* 716 F.2d 714, 727 n.24 (9th Cir. 1983). In the extraordinarily unlikely event that Real Party failed to appeal an adverse judgment, Petitioner Vasquez could still assert an appealable interest in the trial court's decision not to apply the potential procedural defaults. See *Electrical Fittings Corp. v. Thomas & Betts Co.,* 307 U.S. 241 (1939) (allowing the prevailing defendant in a patent infringement case to appeal that portion of the judgment declaring the patent valid).

In short, the Petitioner Vasquez' concern that the order of the district court may become immune from appellate scrutiny is utterly unfounded. Consistent with the policies against piecemeal review and its incident delay of trial court proceedings is the view that the

proper time for that appellate review is after entry of final judgment.

CONCLUSION

For the foregoing reasons, Real Party In Interest respectfully requests that the Petition For Certiorari be denied.

DATED: August 20, 1993

LAW OFFICES OF DAVID H. SCHWARTZ

By _____
DAVID H. SCHWARTZ

Attorneys for Party In Real Interest, DAVID L. MURTISHAW

APPENDIX A

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DAVID L. MURTISHAW, Petitioner, vs. DANIEL VASQUEZ, Warden of the California State Prison, San Quentin, Respondent.	No. CV-F-91-508 OWW-P DEATH PENALTY CASE ORDER

Respondent's motion to dismiss five of the twenty-one claims contained in the petition for writ of habeas corpus was orally argued on January 13, 1992, in Courtroom Two. Respondent moved to dismiss Claims 5, 9, 15, 19, and 20 of the petition based on procedural default. Petitioner was represented by David H. Schwartz, Esq. and Respondent was represented by Deputy Attorney General Susan R. Bunting, Esq. Petitioner opposed this motion.

Claim 19 and Claim 20 of the petition for writ of habeas corpus are unexhausted. Pursuant to 28 U.S.C. §2254(b), a petitioner is required to exhaust the remedies available in state court prior to presenting his habeas corpus petition to the federal court. Petitioner has an available state court remedy for Claims 19 and 20.

The exhaustion requirement is a matter of comity, not jurisdiction. Ex Parte Royall, 117 U.S. 241, 250-51 (1866);

Harris v. Superior Court, 500 F.2d 1124, 1126-27 (9th Cir. 1974). In the interest of comity, the petitioner shall return to state court to exhaust his state court remedies.

In the interest of efficiency, this court postpones ruling on whether Claims 5, 9, and 15 of the petition should be dismissed until Petitioner returns from the state court. After the petitioner has exhausted all of his state court remedies and, if he so chooses, amend his federal petition to describe those exhausted claims, Respondent may renew the motion to dismiss based on procedural default grounds and shall address all claims to which objection on the grounds of legal insufficiency is raised.

For the foregoing reasons, IT IS ORDERED:

1) Respondent's motion to dismiss Claim 19 and Claim 20 of the petition for writ of habeas corpus is DENIED;

2) Petitioner shall return to the California Supreme Court to exhaust Claim 19 and Claim 20;

3) Because the petition contains unexhausted claims for which a state court remedy is still available, Petitioner is granted a sixty (60) day stay of execution to seek a further stay from the state court to litigate his unexhausted claims. Local Rule 191 (h)(5). These federal habeas proceedings will be stayed during the state court proceedings. Id.;

4) Respectful request is hereby made to the California Supreme Court for an early disposition of the unexhausted claims to prevent delay;

5) The clerk of the court shall serve a certified copy of this order on Daniel Vasquez, Warden of San Quentin Prison, Tamal, California; the California Attorney General or his designated

representative; Arthur Ruthenbeck, Federal Defender; and the Clerk of the California Supreme Court;

6) Petitioner shall keep this court apprised of the progress of his state court proceedings by filing a status report;

7) Petitioner is directed to immediately proceed in the state court. He shall forthwith notify this court, in writing, that he has exhausted his state court remedies and been denied relief. Pursuant to Local Rule 191 (h)(5), Petitioner may then amend his federal petition for writ of habeas corpus to include his newly exhausted claims. Within fifteen (15) days following service of such notice, Respondent shall renew the motion to dismiss based on procedural default.

DATED: March 26, 1992

OLIVER W. WANGER
United States District Judge

No. 93-123

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

DANIEL VASQUEZ, Warden Of The California State Prison at San Quentin,

Petitioner,
vs.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,

Respondent,

DAVID LESLIE MURTISHAW,

Real Party In Interest.

AFFIDAVIT OF MAILING

David H. Schwartz, being duly sworn, deposes and says:

I am a member of the Bar of the Supreme Court of the United States.

On August 20, 1993, at approximately 8:00 p.m., I deposited at the United States Mail, Stockton and O'Farrell Streets, San Francisco, California, a sealed envelope addressed to the following persons, first-class postage pre-paid, containing one copy of Brief In Opposition By Real Party In Interest:

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Procedural History of Claims Challenged By State

Amended Pet Claim No	Issue Presented	Raised In 1st State Petition	Raised In Original Fed Petition (10/1/91)	Raised In 2nd State Petition	Basis For Denial
Ground No. 2	IAC At Guilt Phase (Various)	Yes	Yes (Ground No. 2)	No	Merits: "[P]etition fails to justify the delay in raising claim
Ground No. 5	Lack Of Jury Finding On Premeditated Murder or Felony Murder	Yes	Yes (Ground No. 5)	No	Merits: "[W]aiver by failure to raise [claim] on direct appeal;" [P]etition fails to justify the delay in raising [claim] "
Ground No. 9	Trial Court Failure To Provide Funds For Psychiatric Experts	Yes	Yes (Ground No. 9)	No	Merits: "[W]aiver by failure to raise [claim] on direct appeal;" [P]etition fails to justify the delay in raising [claim] "
Ground No. 10A	IAC At 2nd Penalty Trial (Various)	Yes	Yes (Ground No. 10, p. 10)	No	Merits Only
Ground 10B	IAC At 2nd Penalty Trial (Fetal Alcohol	No	No	Yes (Ground 8)	Merits: "Untimely"
Ground 19	Use of lethal gas violates 8th Amdmt	No	Yes (Ground 19, p. 129)	Yes (Ground 1)	Merits: "Untimely"
Ground 20	Death Penalty Initiative Unconsitutional	No	Yes (Ground 20, p. 130)	Yes (Ground 2)	Merits: "Untimely"